No. 75-1451

In the Supreme Court of the United States

OCTOBER TERM, 1976

OAKLEY G. SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

WILLIAM G. OTIS,
MICHAEL E. MOORE,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1451

OAKLEY G. SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-29) is reported at 523 F. 2d 771.

JURISDICTION

The judgment of the court of appeals (Pet. App. 30) was entered on November 17, 1975, and a petition for rehearing with suggestion for rehearing *en banc* (Pet. App. 32-33) was denied on February 13, 1976. On March 1, 1976, Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to April 13, 1976. The petition was filed on April 12, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was properly prosecuted for making fraudulent representations in statements designed to

obtain Medicare reimbursement from the Federal Government under the general false statements statute (18 U.S.C. 1001), rather than under the statute specifically prohibiting false statements relating to social security payments (42 U.S.C. 408(c)).

2. Whether the statements petitioner made were false.

STATEMENT

After a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of willfully making a false and material statement concerning matters within the jurisdiction of the Department of Health, Education, and Welfare in the 1971 fiscal year, in violation of 18 U.S.C. 1001. He was fined $7,500 and sentenced to three years' imprisonment, all but 75 days of which were suspended in favor of 24 months' probation. The court of appeals affirmed (Pet. App. 1-29).

As summarized by the court of appeals, the evidence showed that petitioner was Chairman of the Board of Trustees and President of Palm Springs General Hospital ("the hospital") of Hialeah, Florida, which participated in the Medicare program (Pet. App. 10). In return for providing medical treatment for Medicare patients, the hospital was reimbursed by the federal government for the costs of those services. A private insurance carrier, Blue Cross of Florida, Inc., administered the program under contract with H.E.W. (*ibid.*).

In order to be reimbursed for its Medicare expenses, the hospital was required to file an annual cost report with Blue Cross listing all expenses incurred in rendering patient care services for the year (*ibid.*). The amount due the hospital under the Medicare program was determined by multiplying the hospital's total reported expenses by the ratio of Medicare patient days to all patient days for the year (*ibid.*).

As chief administrator of the hospital, petitioner was responsible for the filing of its cost reports for 1969, 1970, and 1971 (*ibid.*). He had complete financial control of the hospital and knew the general method by which the Medicare reimbursement program worked (*ibid.*).

During the period covered by those cost reports, petitioner caused the hospital to pay the costs of remodeling his private home (Pet. App. 11-14) and to pay for a home delivery diaper service for his newborn children (Pet. App. 17-18). Moreover, he knew that part of the payments the hospital made to a computer service company were not legitimate business expenses but were paid to his nephew (Pet. App. 14-19). Indeed, petitioner frequently endorsed his nephew's name on the checks to the computer company and cashed them (Pet. App. 16). The hospital included these improper expenses on its Blue Cross cost reports as reimbursable operating expenses (Pet. App. 11, 13, 17).

ARGUMENT

1. Petitioner contends (Pet. 12-26) that he was improperly prosecuted under 18 U.S.C. 1001[1]—the general false statements statute, the violation of which is a felony—because the conduct for which he was convicted (the making of false statements in connection with a claim for Medicare reimbursement) also violated 42

---

[1]18 U.S.C. 1001 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

U.S.C. 408(c).[2] This is a subsequently enacted statute which makes it a misdemeanor to make any false statement in connection with obtaining payments under the Social Security Act and which, petitioner argues, Congress intended to be the sole basis for prosecution for making false statements in connection with Medicare reimbursement.

This Court unanimously rejected a similar argument 35 years ago in *United States* v. *Gilliland*, 312 U.S. 86. The Court there upheld a conviction under a predecessor of Section 1001 (Section 35 of the Criminal Code) resulting from the making of false statements with regard to the flow of so-called "hot oil," even though Congress had subsequently enacted a statute with lesser maximum penalties that prohibited false representations specifically dealing with "hot oil." In rejecting the claim that the subsequent statute "operated to repeal" the earlier one "so far as the latter applied to affidavits, documents, etc., presented in relation to 'hot oil,'" the Court stated (312 U.S. at 95-96):

> There was no express repeal and there was no repugnancy in the subject matter of the two statutes which would justify an implication of repeal. The Act of 1934, with its provision as to false and fraudulent papers, has its place as a fitting complement to the Act of 1935 as well as to other statutes under which, in connection with the authorized action of governmental departments or agencies,

[2] 42 U.S.C. 408(c) provides:

> [Whoever] at any time makes or causes to be made any false statement or representation of a material fact for use in determining rights to payment under this subchapter * * * shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000 or imprisoned for not more than one year, or both.

> the presentation of affidavits, documents, etc., is required. There is no indication of an intent to make the Act of 1935 a substitute for any part of the provision in § 35.

The Court's reasoning in *Gilliland* is equally applicable to the present case. The broad language of Section 1001, which prohibits the making of "any false, fictitious or fraudulent statements or representations" "in any matter within the jurisdiction of any department or agency of the United States" covers the making of false statements to an agency of the United States in connection with claims for Medicare reimbursement.[3] As in *Gilliland*, neither the language nor the legislative history of Section 408(c) evidences any intention to repeal Section 1001 in its application to fraudulent Medicare claims. Nor is there any repugnancy between the two statutes "which would justify an implication of repeal" (*Gilliland*, *supra*, 312 U.S. at 95).

The courts that have considered whether Section 1001 covers the making of false statements in connection with obtaining Medicare payments agree that it does. In *United States* v. *Matanky*, 346 F. Supp. 116 (C.D. Calif.), affirmed, 482 F. 2d 1319 (C.A. 9), certiorari denied, 414 U.S. 1039, the district court held that a medical doctor had been properly indicted under Section 1001 for making false statements in applications for Medicare payments, and that the fact that the conduct also violated Section 408(b), a related provision to Section 408(c), did not bar prosecution under

[3] The false statements in this case were not made directly to the federal government but to Blue Cross of Florida, which administered the Medicare reimbursement program for the federal government. Since the statements submitted to Blue Cross were designed to obtain payment from the federal government, they are statements made "in a matter within the jurisdiction" of the federal government within the meaning of Section 1001. *United States* v. *Matanky*, 482 F. 2d 1319 (C.A. 9), certiorari denied, 414 U.S. 1039; *United States* v. *Kraude*, 467 F. 2d 37 (C.A. 9), certiorari denied, 409 U.S. 1077.

the general false statements statute. Relying upon *Gilliland*, *supra*, the court could not "infer that the subsequent adoption of 42 U.S.C. § 408(b) reveals a 'clear and manifest' intent to curtail the broad application of the earlier statute [Section 1001]" (346 F. Supp. at 118).

In *United States* v. *Chakmakis*, 449 F. 2d 315, the Fifth Circuit previously had held that a doctor may be prosecuted under Section 1001 for making false statements in connection with Medicare payments, and that Section 408(c) did not bar prosecution under the felony statute. It stated that "the enactment of the latter section [Section 1001] did not repeal the former [Section 408(c)]" and that "the prosecution could have been brought under either, at the discretion of the prosecutor" (449 F. 2d at 316). See also, *United States* v. *Burnett*, 505 F. 2d 815 (C.A. 9), certiorari denied *sub nom. Lyon* v. *United States*, 420 U.S. 966, where the court upheld a conviction under Section 1001 for making false statements in connection with obtaining unemployment benefits for prior federal service, even though another statute with lesser penalties specifically covered that offense.

Petitioner cites (Pet. 15-23) a number of decisions of this Court and the courts of appeals which, he asserts, indicate that his prosecution under the felony statute was improper. Those cases, however, all involved different statutes, and do not shed any light on the question whether Congress intended by the subsequent enactment of the statute making it a misdemeanor to file false statements in connection with social security payments to bar prosecution under the earlier felony statute for willfully filing false statements with the government.

Several of the cases petitioner cites (Pet. 21-23) deal with the question whether a defendant indicted under statutes making it a felony to evade taxes is entitled to a jury instruction governing the lesser included offense

of filing false returns. They are inapplicable to the present case, where no lesser included offense instruction was sought; they do, however, recognize that, where the same conduct violates two statutes, the prosecution has discretion to proceed under the Act providing the more severe penalties.

2. Petitioner argues (Pet. 27-32) that the false statements for which he was convicted were true. The court of appeals properly rejected this contention (Pet. App. 22-23), and there is no occasion for further review of this factual issue.

The theory of the prosecution was that the $1,394,245 allotted to the hospital's administration and general expenses on the Medicare cost report fraudulently included the improper items (Pet. App. 22). Petitioner argues that since the form's instructions merely require reporting the "direct expenses of the hospital, * * * as shown in the hospital's books," there can be no fraud as long as the figures reported are the same as those on the hospital's records, even though the latter are false.[4] The fraudulently inflated expense claim, however, misrepresented the hospital's actual expenses. Since petitioner does not deny that he knew that this expense item included the improper payments, he made a false representation by knowingly using that item on the Medicare cost report.

---

[4]Since the prosecution fully supplied the defense with the particulars of the fraudulent transactions it intended to rely upon at trial, the court of appeals correctly held (Pet. App. 21) that petitioner was sufficiently informed of the nature of the charges to allow preparation of an adequate defense.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

WILLIAM G. OTIS,
MICHAEL E. MOORE,
Attorneys.

JULY 1976.

DOJ-1976-07